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Record No. 91-848

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROANOKE RIVER BASIN ASSOCIATION and STATE OF NORTH CAROLINA,
Petitioners,

v.

COLONEL RONALD E. HUDSON, in his official capacity as Norfolk District Engineer, and THE CITY OF VIRGINIA BEACH, VIRGINIA,
Respondents.

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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This case presents clear conflicts between courts of appeals over issues central to the National Environmental Policy Act, particularly on the meaning of cumulative impacts, uncertainty and controversy. The opinion below is also in conflict with opinions of other courts of appeals on the requirement to explain how mitigation obviates the need to prepare an environmental impact statement, and on the duty to disclose to the public information upon which the decision not to prepare an EIS was based. The holding below also conflicts with this Court's rule that critical information on which an agency relies for its decision must be disclosed to the public before the agency decision is made. See Petition ("Pet.") at 34-37.

Respondents attempt to divert the Court's attention from the crucial legal issues raised by the Petition by alleging numerous "misstatements" by petitioners. In doing so, respondents themselves have misrepresented the record, as will be shown below. Even if respondents' assertions were true, the opinion below still would create the clear

conflicts on the important issues described above. Respondents have not adequately addressed any of these conflicts, particularly the following.

Failure to Explain Mitigation

In response to petitioners' argument that the Corps never explained how its proposed mitigation would work, the Corps argues that it was not required to make proposed mitigation available for public comment because the CEQ regulations do not require circulation of EAs. Brief for Federal Respondents ("Corps Br.") at 7-8. This contention is irrelevant. The issue is not whether the Corps was required to circulate its EA for comment, but whether it was required to explain precisely how the mitigation condition would work. Indeed, each of the decisions from the Ninth Circuit cited in the petition (at 27) involved the same situation – the agency had relied upon mitigation to avoid preparing an EIS – and in each case the Ninth Circuit overturned the agency action for failure to explain how the

mitigation would work.

Respondents, relying entirely upon an excerpt from the draft SEA, assert that the Corps did explain the proposed mitigation. Corps Br. at 8, Virginia Beach Brief ("City Br.") at 25-26 (quoting JA 1071).[1] This passage from the SEA does not support this assertion. The SEA states only that Virginia Beach "offered to utilize" its storage space in Kerr Reservoir to eliminate any additional lost days, and then makes a conclusory and erroneous statement that this use of storage could completely eliminate all project effects. It does not establish that the Corps considered this "offer" a mitigation plan. Indeed, as explained in the Petition (at 28), the NFMS and USFWS have both stated that the Corps never gave any explanation of any proposed mitigation.[2]

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[1] The Court of Appeals and the District Court also relied upon this excerpt from the SEA. See 940 F.2d at 64, Pet. at 19a; 731 F. Supp. at 1265, Pet. at 40a-42a.

[2] Both the Corps and Virginia Beach assert that these statements cannot be considered because they were made after the close of the (continued...)

Moreover, this excerpt from the SEA does not explain how this use of storage space would work. Petitioners, the resource agencies and the public were left to puzzle over how releases from the Virginia Beach storage could completely eliminate all effects. Their comments reflected this confusion. See, e.g., JA 1513, 1516-17. Therefore, even assuming this statement could be construed as a mitigation proposal,[3] it clearly does not meet the requirement of the Ninth Circuit decisions that an agency must explain how the proposed mitigation will work. See Pet. at 26-27.

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[2](...continued)
administrative record. Corps Br. at 10 n.5, City Br. at 27-28. That assertion is incorrect. These letters do not provide substantive evidence which is intended to supplement the record, but rather evidence of what the Corps had actually done. As the Ninth Circuit has held, a reviewing court may consider material outside of the record to determine the basis of the agency's action and the factors the agency did or did not consider. See, e.g., Love v. Thomas, 858 F.2d 1347, 1356 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989); Asarco, Inc. v. EPA, 616 F.2d 1153, 1158-60 (9th Cir. 1980).

[3] Nothing in the record even suggests that the Corps or Virginia Beach considered this statement a formal mitigation proposal at the time it was made. Instead, it appears that respondents have simply labelled this excerpt a mitigation proposal for the purposes of litigation.

Certiorari is warranted to resolve this conflict between the Ninth Circuit decisions and the opinion below.

Virginia Beach also asserts that the mitigation condition will "eliminat[e] any possible impact on striped bass" because with mitigation Virginia Beach's withdrawals will cause no additional "lost days." See City Br. at 17. This assertion, which is not supported by the Corps in its brief, is wrong. Simply stated, a "lost day" occurs when there is insufficient water flow to support the striped bass stock.[4] Virginia Beach's proposed use of storage is only intended to make sure that the City's withdrawals do not cause any more lost days (JA 1071) – no mitigation will be provided on the critical days when there is already insufficient flow. Therefore, Virginia Beach will be allowed to withdraw 60,000,000 gallons of water on each of these

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[4] Virginia Beach acknowledges that there is insufficient storage in Kerr Reservoir in some dry years to provide augmentation releases for the entire augmentation period. City Br. at 11.

already critical days without providing any mitigation. The Corps completely failed to take into account the impact of Virginia Beach's withdrawals on already lost days. Virginia Beach's assertion that this proposed mitigation will eliminate all impacts on striped bass is, therefore, simply wrong.[5]

Withholding of Information

Respondents attempt to rationalize the Corps' failure to disclose crucial modeling information by arguing that the Corps could not have disclosed two memoranda containing the information (JA 1675, 1857) to the public because they were not prepared until after the public comment period

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[5] The Court of Appeals refused to consider this argument, allegedly because it was not made to the Corps during the public comment period, and Virginia Beach urges this Court to do the same. See 940 F.2d at 63-64, Pet. at 17a-18a; City Br. at 43-45. This argument only explains the self-evident flaws in the proposed mitigation and does not provide new technical information that the Corps needed to consider. Even Virginia Beach admits that this analysis is based on "simple fact." City Br. at 44 n.13. It is manifestly unjust for the lower court to sanction the Corps' failure to explain the mitigation, which made it impossible for the public to fully analyze and comment on the project with mitigation, and then refuse to allow petitioners to present this argument about the inadequacies of the proposed mitigation during the judicial review process. See Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 540-41 (D.C. Cir. 1983).

closed. Corps Br. at 10-11; City Br. at 31-32. This argument misses the point entirely. While these two memoranda may not have been written yet, the information contained in them was clearly available to, and relied upon by, the Corps. Indeed, petitioners repeatedly requested such information. JA 1475-76. Respondents have never disputed that the Corps could have disclosed this information to the public in some form prior to the close of public comment.

The remainder of the Corps' argument on this issue is merely the Corps' analysis of the law cited in the Petition at 31-37, which required the Corps to disclose all relevant information to the public. This law is adequately addressed in the Petition and will not be explained further here.

Virginia Beach, on the other hand, does not dispute petitioners' analysis of the applicable law, but instead bases its argument on the assertion that the Corps did not withhold any information. It is telling that the Corps itself does not make this assertion in its brief. Moreover, Virginia Beach's

argument was not accepted by the court below. As explained in the Petition (at 32-33), the court below did not hold that the Corps disclosed all information, but rather that the court was "satisfied that the [petitioners] were not prejudiced by any slowness or incompleteness in the Corps' disclosure of modeling information." 940 F.2d at 65, Pet. at 25a. By so ruling, the court ignored established precedent from this Court and other courts of appeals which requires an agency to disclose such information for public review and comment. See Pet. at 31-37.

Virginia Beach nevertheless makes the extraordinary argument (City Br. at 33-34) that the decision of the court below, despite its clear language, had nothing to do with the Corps' failure to disclose information. The information that the Corps withheld purported to explain its modeling.[6]

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[6] Indeed, Virginia Beach relies exclusively on one of these documents – JA 1675a – as the purported complete analytical defense of the Corps' modeling. See City Br. at 34-35.

Therefore, the withholding of information and the Corps' failure to defend its modeling were closely related. The court below accordingly addressed both issues together, holding that the Corps was not required to provide an explanation of its modeling beyond providing the computer code to petitioners, and that petitioners were not prejudiced by the Corps' failure to disclose information. 940 F.2d at 65, Pet. at 24a-25a. Under Virginia Beach's strained reading of the opinion, the court never addressed a critical issue that was fully briefed and argued by the parties.

This Court should grant certiorari to resolve the conflict the opinion below creates with prior decisions of this Court, the express provisions of NEPA, and the binding CEQ and Corps regulations, all of which required the Corps to disclose its crucial modeling information. See Pet. at 33-37.

Failure to Provide Complete Analytical Defense of Model

The Corps argues that the line of decisions from the Court of Appeals for the District of Columbia requiring an agency to completely explain and defend any modeling upon which it relies (see Pet. at 38 and n.14) are not on point because they do not arise under NEPA. This contention is irrelevant. These decisions establish a principle of administrative law by which the Corps is equally bound.

Beyond that misplaced argument, the respondents only dispute that one opinion of the Court of Appeals for the District of Columbia of several relied on by petitioners – Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983) – conflicts with the opinion below, apparently conceding that the others do. See Corps Br. at 13-14; City Br. at 37-39. Even assuming respondents'

reading of Small Refiner is correct,[7] this Court should review the opinion below to address the conflict it creates with the five other decisions from the District of Columbia cited in the Petition at 38.

Virginia Beach alleges (City Br. at 34-35) that the Corps provided a complete analytical defense of its model. Again, the Corps does not make this assertion, and the court below did not accept it. Instead, the court dismissed petitioner's argument because, in its view, "[petitioners] have not explained what use they expect to make of the 'complete articulation of underlying modeling assumptions' that they claim they never received." 940 F.2d at 65, Pet. at 24a. By so holding, the court ignored (indeed did not even mention)

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[7] In fact, respondents have misconstrued Small Refiner. In Small Refiner, the court required the agency to demonstrate that its failure to disclose information did not foreclose an opportunity for "meaningful public comment." 705 F.2d at 540. The court below placed no such burden on the Corps. The Small Refiner court also held that the evidence withheld in that case was merely duplicative, and therefore its use did not constitute reversible error. Id. at 541. Here, in contrast, the documents the Corps did not disclose provided the only information which purported to explain the Corps' model.

the decisions from the District of Columbia Circuit cited above.

In any event, the lower court's holding that petitioners were required to explain in detail how they were prejudiced by the Corps' failure to explain its model imposes an impossible burden on parties challenging agency action. The court below upheld the Corps' action based entirely on the mitigation condition. See 940 F.2d at 62-64, Pet. at 13a-20a. The Corps analyzed the effectiveness of the mitigation only in its modeling. Nevertheless, the Corps never provided any explanation or defense of that modeling. The resulting prejudice to petitioners is most vividly demonstrated by Virginia Beach's repeated assertion (City Br. at 42-43, 46, 47 n.14, and 58) that "no commentor" questioned the impacts of the project with mitigation during the public comment period. That is precisely the point. How could anyone comment at that time on the effects of the project with mitigation when the Corps never provided any

information as to how the mitigation would work? Without such vital information, it would be virtually impossible for anyone to detail what the resulting prejudice would be. That presumably is why the Court of Appeals for the District of Columbia does not require such proof.

Controversy

Relying primarily on this Court's opinion in Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989), Virginia Beach argues that the Corps properly dismissed the comments of the expert agencies and others which questioned the Corps' conclusions and urged the Corps to prepare an EIS. This argument fails to account for the difference between a decision not to prepare an EIS and the separate question, addressed in Marsh, of whether an agency must supplement an EIS that has already been prepared.

While these two issues may be similar in some ways (see id. at 374), they are fundamentally different in important respects. When an agency refuses to prepare an EIS, the

only NEPA analysis will be contained in the EA. As the First Circuit has explained, an EA and an EIS serve very different purposes:

> An EA aims simply to identify (and assess the 'significance' of) potential impacts on the environment; it does not balance different kinds of positive and negative environmental effects, one against the other; . . . The purpose of an EA is simply to help the agencies decide if an EIS is needed.
>
> To treat an EA as if it were an EIS would confuse these different roles, to the point where neither the agency nor those outside it could be certain that the government fully recognized and took proper account of environmental effects in making a decision with a likely significant impact on the environment. For one thing, those outside the agency have less opportunity to comment on an EA than on an EIS. . . . For another thing, those inside the agency might pay less attention to environmental effects when described in an EA than when described in an EIS.

Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985) (citations omitted). These issues do not arise in cases where an agency is deciding whether to supplement an EIS because

a full environmental study will have already been conducted.

Moreover, requiring an agency to prepare an EIS in the face of substantial, contrary expert opinion does not provide other agencies with "veto" authority, as Virginia Beach alleges. City Br. at 49-50. The ultimate decision regarding whether to issue the required permit would still reside with the Corps. The issue here is not whether the project should ultimately be approved, but whether the Corps can summarily dismiss contrary expert views without analyzing them in an EIS. As the Ninth Circuit has repeatedly held,[8] it is precisely in such situations that an EIS must be prepared, even if the Corps does not agree.[9] This

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[8] See Pet. at 44 and n.17. The Corps argues (Corps Br. at 15-16) that the Ninth Circuit did not rely on the existence of controversy alone to invalidate agency action in those cases. To the contrary, in each case, the Ninth Circuit treated the existence of such controversy as an independent basis for invalidating agency action. Moreover, as has been explained above and in the Petition, the Corps has violated several principles of law in this case, not just the CEQ regulation concerning controversy.

[9] Virginia Beach mistakenly relies upon several cases which (continued...)

principle is particularly important in cases such as this where the central issue – the adverse impacts on striped bass – is within the expertise of the commenting agencies (i.e., the Fish & Wildlife and National Marine Fisheries Services) and not the agency responsible for complying with NEPA. The Corps was required to review this project only because it had authority to issue a permit for the discharge of dredged or fill material into navigable waters and for the construction of river crossings. Unlike the FWS and NMFS, the Corps has no particular expertise in fisheries biology.

Certiorari should be granted to decide whether this Court's ruling in Marsh extends to situations where an agency refuses to prepare an EIS despite overwhelming, contrary expert opinion, and also to resolve the clear conflict between the opinion below and the decisions of the Ninth

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[9](...continued)
establish that agencies must independently assess the impacts of a proposed project. City Br. at 50. These cases only concern the separate and irrelevant issue of whether an agency may rely on a NEPA review previously completed by another agency.

Circuit.[10]

Cumulative Impacts

Virginia Beach insists that the Corps had no obligation to conduct a cumulative impact analysis. This ignores the CEQ definition of "cumulative impact" as being

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. §1508.7. The Corps clearly had a duty to conduct a cumulative impact analysis.

Virginia Beach also provides a lengthy list of record citations to make it appear that the Corps conducted this

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[10] The Corps concludes its discussion of the CEQ regulation governing controversy by asserting that the Court of Appeals upheld the Corps' finding of no significant environmental impact "even in the absence of the mitigation condition." Corps' Br. at 16 n. 9. There is no statement in the opinion below to that effect. To the contrary, the court below based its decision entirely on the Corps' analysis of the project with mitigation. See 940 F.2d at 62-64, Pet. at 13a-20a.

analysis. City Br. at 59-61. However, a close review of those documents demonstrates, as petitioners previously explained (Pet. at 53), that the Corps merely recited several factors that may impact striped bass and concluded that "overfishing probably was the principal reason for the collapse of this fishery." JA 1835a. This simply does not meet the requirement established by three other courts of appeals that the agency must assess the overall impact of the project when added to all existing and reasonably foreseeable conditions affecting striped bass. See Pet. at 52-53. This Court should grant certiorari to resolve the conflict between the opinion below, which is consistent with the Fourth Circuit's prior opinions on this issue (see Pet. at 54 n.22), and the decisions from the Second, Fifth and Ninth Circuits discussed in the Petition at pages 52-53.[11]

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[11] Virginia Beach also argues that 40 C.F.R. § 1508.27(b)(7) applies only to directly interrelated actions. City Br. at 61-62. The Corps does not join in this argument, and Virginia Beach offers no direct authority to support it. Rather, Virginia Beach only cites an opinion (continued...)

It is self-evident that a project that will have an adverse impact on a resource which is already significantly affected by past actions will itself have a significant effect on that resource, even in a case where the impact of that project in isolation would not be significant. Congress found in 1988 that Albemarle-Roanoke striped bass are already significantly affected by existing conditions, including pollution, inadequate flows and fishing pressure. P.L. 100-589, §5, 16 U.S.C. §1851 note (1988).[12]

The Corps acted arbitrarily in concluding that the project will not have a significant effect on striped bass

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[11](...continued)
from this Court – Kleppe v. Sierra Club, 427 U.S. 390 (1976) – which dealt with the entirely separate question of whether an agency was required to prepare one EIS for similar but unrelated projects. See Hanly v. Kleindienst, 471 F.2d 823, 831 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973).

[12] In pointing out that separate 1990 congressional action occurred after the Corps' final decision, Virginia Beach attempts to divert attention from the fact that the Corps failed to consider this 1988 congressional finding that striped bass were already significantly affected – an issue squarely presented to, but ignored by, the court below and the Corps. JA 1735, 1757.

because it completely failed to consider the combined effect of the existing conditions and the added effect of the project, as the CEQ regulations require. If the project is evaluated in that way, it is undisputed that Virginia Beach's proposed withdrawals will have a cumulatively significant impact which requires the preparation of an EIS.

Conclusion

For the reasons stated in the Petition and above, a writ of certiorari should be granted.

Respectfully submitted,

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